United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1022

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

WILLIAM SANGEMINO,

Defendant-Appellant.

On Appeal from the United States District Court for
the Southern District of New York

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PRELIMINARY STATEMENT

Moving pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellant petitions this court to grant him a rehearing in banc from his conviction in the District Court. This petition is based upon the brief previously filed with this court, along with a two-volume printed appendix and the facts stated in this petition. The appellant asserts two grounds for granting a re-hearing:

1. In denying appellant's second motion for a new trial, the District Court did not accurately perceive the relevance of the newly discovered evidence that Nathan Lemler possessed records indicating refunds in excess of $500,000 to the appelant's defense.

2. In denying appellant's appeal, this court did not understand the inter-relationship of the argument of ineffective assistance of counsel to the argument that the government's failure to comply with its Brady responsibilities in turning over the Falcoff grand jury testimony denied the appellant a fair trial.

ARGUMENT

I.

The District Court incorrectly perceived the relevance of Lemler's post-trial testimony regarding his refund of moneys.

The sum and substance of the government's case against the appellant were the allegations of Nathan Lemler that the appellant could fix Selective Service cases and did so in return for the payment of moneys. During his testimony, Lemler was unable in any form to describe what the appellant did for the money he allegedly received. When asked what

service was being performed, Lemler said "I have no way of knowing, sir, but he just rubbed a magic lamp." (146a). One thing Lemler was sure of -- he was sure that the appellant had interceded in 401 cases and had been successful in 400 of those cases (76a). For his actions in these 401 cases, Lemler testified he paid the appellant $50,000 over a 5-year period (65a). It obviously becomes relevant to corroborate the figures Lemler gives as to his rate of success to ascertain what credibility should be given to Lemler's story.

Lemler's testimony at the trial concerning his records of these transactions is at best evasive. At page 64 of the trial transcript, Lemler was asked the question:

"Are you able to place the number of times that you went to him with Selective Service or military related problems?

A.: Exactly 401 times.

Q.: Can you tell us how, after this passage of time, with that great number of cases you can be so exact?

A.: Because I kept a bookkeeping system, a file system, of 3 by 5 white cards: One set for the medical or dental school or graduate school placements, one set specifically for military cases, and just the night before my office was

closed, when I knew that the Attorney General's representative was coming in with a court order, I counted these cards in both files before turning them over to my daughter, who then worked for me, for safekeeping in her home.

The Court: You say the Attorney General, you mean the New York State --

The Witness: Of New York State.

The Court: The New York State Attorney General?

The Witness: Yes, sir."

On page 73 of the trial transcript, Lemler is asked the following questions and gave the following answers:

"Q.: When was the last time you saw those index cards?

A.: The night before my office was closed.

Q.: Have you ever seen them since?

A.: No, sir, I have not.

Q.: Do you know their present whereabouts?

A.: No, I don't."

At page 215 of the trial transcript, Lemler states that he gave the appellant well over $50,000, that each payment was marked on the white 3 by 5 cards and that those cards are missing.

At his post-trial testimony in New Jersey, Lemler states that he worked on a total refund basis as he stated

at appellant's trial, and that his records indicate that over a four-year period he returned better than half a million dollars to those customers who were not satisfied with his services (697a). In the court's decision (698a), it is stated that the relevance of these records to the case against appellant is unknown and appears to be dubious at best.

At appellant's trial, Lemler testified that he had not seen his records since before he was arrested in 1971. The appellant submits that any records of Nathan Lemler's financial transactions during the applicable period of time are relevant to the charges in this case. It defies credibility that Lemler's success was 400 of 401 cases and yet he had to give back nearly one-half the gross revenues received. At appellant's trial, Lemler was allowed to make blanket assertions as to how much money he paid appellant and to state, based upon missing records, appellant's rate of success. It is obvious from his testimony at the above-mentioned pages of the transcript that Lemler has a method documenting his allegations, that despite his denial of control over those records at appellant's trial within two months after its termination he stated under oath he has

possession of records concerning his financial transactions during the period in question.

At the very least, the appellant should be granted an evidentiary hearing to ascertain what records Nathan Lemler alluded to at the hearing in Jersey, how he came to get those records back, in whose possession those records were at the time of appellant's trial and whether or not those records reflect the payment of $50,000 to appellant for his alleged participation in 401 Selective Service cases.

It must be noted that during the entire period in question, encompassing both the appellant's trial and the hearing before Judge Meanor in New Jersey, Lemler was incarcerated. To gain access and control over any records during this period of time, he had to have some aid, either by friends, government personnel or privately retained counsel. Those records can be construed as crucial documentary evidence which, depending upon their content, could show Nathan Lemler to be a perjurer. And based on his stated rate of success at appellant's trial compared with the refund rate testified to in Newark, one can only conclude such testimony would be exculpatory of appellant.

II.

The appellant's argument that he was denied his constitutional rights based on the ineffective assistance of counsel is intimately intertwined with his allegation of late disclosure of exculpatory material.

During all pre-trial proceedings the government contended that Nathan Lemler paid appellant on behalf of others (38a-39a) and twenty-six of those persons would possibly be named at the trial (24a). At no time during these pre-trial proceedings does the government indicate that any of these persons would contradict Lemler's testimony. Therefore, any pre-trial examination of relevant Selective Service files would be undertaken to find justification for the deferment the applicant received.

Under any formulation of the effective assistance of counsel equation, diligence is a component. In appellant's case, counsel never bothered to examine the Selective Service files made available by the government prior to trial. This lack of diligence was noted by the court on February 14, 1975 (48a). Failing to examine the file, counsel was unable to ascertain, and appellant who did examine the file was not qualified to ascertain, that the medical records substantiating a petit mal epilepsy condition

which offered the justification for the Selective Service action taken on behalf of Richard Falcoff was not a record kept in the ordinary course of busines by Selective Service. The failure to review these files prejudiced the appellant later in the trial. Counsel admitted failure to examine was solely his own lack of diligence (337a) and that various methods of proving the authenticity of the document were available to the defense but not explored. The failure to personally examine this document ultimately inured to the prejudice of the appellant.

The court states the Falcoff grand jury testimony was of dubious value (578a) and therefore could have been overlooked by the prosecutor. What this position fails to take into account is the effect this late disclosure had on appellant's trial preparation.

Early in the proceedings, the trial judge stated he would not let the government try 400 cases and therefore a representative sample of cases should be selected (35a, 36a). The government agreed with this procedure and the defense therefore was justified in inferring that all alleged bribe givers fell into one classification, corroborative of Lemler. Pre-trial disclosure of the Falcoff's contradiction of the Lemler allegation would have caused

the defense to put top priority on locating others who Lemler said paid to avoid military service and producing those men to contradict Lemler. One such man, Edward Resnick, told a reporter for Newsday in an article written on May 11, 1975, that he got out of the service because he was overweight and for no other reason. Although this is not part of the record, it is indicative of the type of inquiry diligent counsel would pursue if forewarned of the Falcoff denials.

Because this court based its summary decision upon the lower court opinions, there is one more area concerning counsel's performance. Archie Speigelman is a witness of admitted experience and repute in Selective Service cases (559a). In an affidavit submitted by appellant in support of his first motion for a new trial, Speigelman issued a stinging indictment of trial counsel's pre-trial preparation of the witness (463a). Despite this, the trial court below found his testimony favorable to the appellant (559a). This characterization, however, is at odds with the court's opinion at the trial. At p. 936 of the trial transcript, the court observed that the defense case, especially Speigelman, seemed to be intent on establishing the appellant's ability to aid individuals to avoid

the service on a medical claim. Thus, it is manifestly obvious that the lack of preparation of Speigelman prejudiced the appellant's defense.

CONCLUSION

For the reasons stated above, it is respectfully requested that this court permit counsel an opportunity to reargue appellant's position concerning the merits of appellant's appeal.

Respectfully submitted,

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